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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~895~~ 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

W. W. SPALDING,
Tower Building, Washington, D. C.,
Counsel for Petitioner.

MASON, SPALDING & McATEE,
Washington, D. C.,
Of Counsel.

(35,026)

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To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, W. P. Brown & Sons Lumber Company, Louisville, Kentucky, presents this its petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Sixth Circuit, which affirmed the decision of the Board of Tax Appeals in the action of this petitioner against the Commissioner of Internal Revenue, No. 9218 of the records of the

Board of Tax Appeals. The opinion of the Circuit Court of Appeals for the Sixth Circuit in this action is reported in 38 Fed. (2d) 425, 431. It appears at pages 38-49 of the record.

This action involves the power of the Commissioner of Internal Revenue to collect from petitioner additional income-excess profits taxes for 1917 assessed by the Commissioner of Internal Revenue against petitioner on March 5, 1923. In its opinion, the Court below sets forth its findings of fact as well as its conclusions of law. The findings of fact stated in the opinion are accepted by petitioner.

Accompanying this petition is a certified transcript of the record below, consisting of pleadings, memorandum opinion of the Board of Tax Appeals, decree and opinion of the Circuit Court of Appeals, but not the evidence.

Summary of Matters Involved.

Petitioner, W. P. Brown & Sons Lumber Company, is a corporation organized under the laws of the State of Kentucky, having its principal office at Louisville, Kentucky.

On April 1, 1918, petitioner filed its income-excess profits tax return for 1917 with the Collector of Internal Revenue at Louisville, Kentucky. On March 5, 1923, the Commissioner of Internal Revenue made a deficiency assessment against petitioner for 1917. Against this additional assessment petitioner filed its claim for abatement later in March, 1923. On December 10, 1923, petitioner signed and delivered to the

Commissioner a waiver in which it consented "to a determination, assessment and collection of the amount of income, excess-profits or war-profits taxes due under any return * * * for the year 1917 * * *". By its terms this waiver expired on December 10, 1924. On October 25, 1924, petitioner signed and delivered to the Commissioner of Internal Revenue a similar waiver extending the period for determination, assessment and collection to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau". This waiver expired on December 10, 1925.

On October 28, 1925, respondent notified petitioner that its said abatement claim had been allowed in part and rejected in part. Being dissatisfied with such decision of respondent, petitioner, on November 18, 1925, prosecuted an appeal therefrom to the Board of Tax Appeals. The determination of the Board of Tax Appeals, made on August 10, 1928, was as follows (Rec. 19):

> "ORDERED, ADJUDGED AND DECIDED, That as to the petitioner, W. P. Brown & Sons Lumber Company, for 1917 there is a deficiency in payment of $3,498.27 * * *."

From such determination of the Board of Tax Appeals petitioner duly prosecuted an appeal to the Circuit Court of Appeals for the Sixth Circuit. On February 21, 1930, the Circuit Court of Appeals entered its

decree and filed its opinion affirming the determination of the Board of Tax Appeals that there was a deficiency in payment by petitioner for 1917 in the amount of $3,498.27.

Upon the hearing of this action in the Court below, petitioner presented the following contentions, among others:

1. That the waivers of December 10, 1923, and October 25, 1924, above mentioned, were invalid because they were given after the expiration of the statutory period for enforcing collection, *i. e.*, after the bar of the statute of limitations had fallen.

2. These waivers by their terms expired long prior to August 10, 1928, the date on which the order of final determination was entered by the Board of Tax Appeals herein. Sections 277-278 of the Revenue Act of 1924 and corresponding Sections of the Revenue Act of 1926 being inapplicable to the present case, collection of the alleged deficiency is now barred by the statute of limitations.

In its decision in this case the Circuit Court of Appeals for the Sixth Circuit denied each of the contentions so presented by petitioner. In so denying each of such contentions the Court below erred; and petitioner now submits the foregoing statement of its contentions and the action of the Court thereon as its assignment of error for purposes of this petition.

Reasons Relied on for the Allowance of the Writ of Certiorari.

The reasons for the granting of this application, relied on by petitioner, are these:

(*a*) The decision of the Circuit Court of Appeals for the Sixth Circuit, now sought to be reviewed, affirming the validity of the waivers given after the bar of the statute of limitations had become effective, is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of the Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865. This conflict is recognized in the decision of the Court below in the present case. These two courts are immediately subordinate to this Court. Both have jurisdiction, in certain cases, of appeals in income-excess profits tax cases from decisions of the Board of Tax Appeals. Section 1002 of the Revenue Act of 1926.

(*b*) The decision of the Circuit Court of Appeals that such waivers are valid is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Pictorial Printing Company *v.* Commissioner, 38 Fed. (2d) 563, decided February 28, 1930. The decision of the Pictorial Printing Company case was therefore decided subsequent to the decision sought to be reviewed in the present case.

(*c*) The decision of the Court below that the period for enforcing collection of any part of the assessment made against petitioner by respondent on March 5, 1923, is to be taken from Section 278 (*d*) of the Reve-

nue Act of 1924, conflicts with the principle of the decision of this Court in the case of Benjamin Russell *v.* United States, 278 U. S. 181.

(*d*) The decision of the Court below that the statutory period for enforcing collection of any part of such assessment may be taken from the Revenue Act of 1926 is in conflict with the underlying principle of the decisions of this Court that deny retroactive effect to taxing statutes in the absence of language susceptible of no other reasonable construction. See, for instance, Schwab *v.* Doyle, 258 U. S. 529.

(*e*) The decision of the Court below that the said waiver of October 25, 1924, is still in full force and effect is in conflict with the language of the waiver itself which by its terms expired on December 10, 1925.

(*f*) Petitioner believes, therefore, that the Court below, in petitioner's case, has decided an important question of general law in a way probably in conflict with the weight of authority; that the decision sought to be reviewed involves important questions of Federal law to be settled by an authoritative decision of this Court; and that the lower Court has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(*g*) The instant case involves questions of general public interest. Many waivers similar to these involved in the present case have been given to respondent by taxpayers. Some of these were given before and others after the expiration of the statutory period of limitation. A conflict of authority regarding the

validity and effect of such waivers is to be found in the decisions of Courts subordinate to this Court. Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity and effect of such waivers. Such uncertainty extends even to the Congress of the United States, which is evident from the enactment of Section 506 of the Revenue Act of 1928. In fact, that Section undoubtedly contemplates that an authoritative ruling shall be made by the courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. As conflict in the decisions of the courts immediately subordinate to this Court regarding the validity of waivers, given after the expiration of the statutory period, now exists, only by a decision of this Court of such question may an authoritative ruling be secured.

The premises considered, petitioner respectfully asks for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals for the Sixth Circuit in petitioner's said case, and the entry of such orders as may be incidental to that relief.

W. W. SPALDING,
Counsel for Petitioner,
1021 *Tower Building,*
Washington, D. C.

MASON, SPALDING & McATEE,
Of Counsel.

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MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for a writ of certiorari in the present case.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Circuit Court of Appeals for the Sixth Circuit on

February 21, 1930, on the appeal of this petitioner to that Court. The opinion of the lower Court may be found in 38 Fed. (2d) 425. It also appears at pages 38-49 of the record.

Jurisdiction.

(*a*) The jurisdiction of this Court under Section 288 of the Judicial Code is invoked (28 U. S. C. A. 129). Subdivision (*b*) of that Section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

(*b*) The date of the decree of the Circuit Court of Appeals sought to be reviewed is February 21, 1930 (Rec. 37). The petition for certiorari was filed in this Court on May 14, 1930.

(*c*) This is an action originating in the United States Board of Tax Appeals involving the power of the Commissioner of Internal Revenue to collect additional income-excess profits taxes from this petitioner for 1917, such income-excess taxes having been assessed in March, 1923 (Rec. 3-5).

(*d*) The jurisdiction of this Court to review decisions of the Circuit Court of Appeals of the several

circuits is recognized in Rule 38 of the rules of this Court.

Statement of Case.

We adopt as a statement of the present case the summary of matters involved and the reasons relied on for the allowance of the writ of certiorari, appearing in the petition for writ of Certiorari in the present case.

Specification of Errors.

The Court below erred in finding and holding against petitioner on each of its contentions advanced in that Court, viz:

1. That the waivers of December 10, 1923, and October 25, 1924, were invalid because they were given after the expiration of the statutory period for enforcing collection, *i. e.*, after the bar of the statute of limitations had fallen.

2. These waivers by their terms expired long prior to August 10, 1928, the date on which the order of final determination was entered by the Board of Tax Appeals herein. Sections 277-278 of the Revenue Act of 1924 and corresponding sections of the Revenue Act of 1926 being inapplicable to the present case, collection of the alleged deficiency is now barred by the statute of limitations.

ARGUMENT.

Summary of Argument.

(*a*) The decision of the Circuit Court of Appeals for the Sixth Circuit, now sought to be reviewed, affirming the validity of the waivers given after the bar of the statute of limitations had become effective, is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of the Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865. This conflict is recognized in the decision of the Court below in the present case. These two courts are immediately subordinate to this Court. Both have jurisdiction, in certain cases, of appeals in income-excess profits tax cases from decisions of the Board of Tax Appeals. Section 1002 of the Revenue Act of 1926.

(*b*) The decision of the Circuit Court of Appeals that such waivers are valid is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Pictorial Printing Company *v.* Commissioner, 38 Fed. (2d) 563, decided February 28, 1930. The decision of the Pictorial Printing Company case was decided subsequent to the decision sought to be reviewed in the present case.

(*c*) The decision of the Court below that the period for enforcing collection of any part of the assessment made against petitioner by respondent on March 5, 1923, is to be taken from Section 278 (*d*) of the Revenue Act of 1924, conflicts with the principle of the

decision of this Court in the case of Benjamin Russell *v.* United States, 278 U. S. 181.

(*d*) The decision of the Court below that the statutory period for enforcing collection of any part of such assessment may be taken from the Revenue Act of 1926 is in conflict with the underlying principle of the decisions of this Court that deny retroactive effect to taxing statutes in the absence of language susceptible of no other reasonable construction. See, for instance, Schwab *v.* Doyle, 258 U. S. 529.

(*e*) The decision of the Court below that the said waiver of October 25, 1924, is still in full force and effect is in conflict with the language of the waiver itself which by its terms expired on December 10, 1925.

(*f*) Petitioner believes, therefore, that the Court below, in petitioner's case, has decided an important question of general law in a way probably in conflict with the weight of authority; that the decision sought to be reviewed involves important questions of Federal law to be settled by an authoritative decision of this Court; and that the lower Court has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(*g*) The instant case involves questions of general public interest. Many waivers similar to these involved in the present case have been given to respondent by taxpayers. Some of these were given before and others after the expiration of the statutory period of limitation. A conflict of authority regarding the validity and effect of such waivers is to be found in the

decisions of Courts subordinate to this Court. Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity and effect of such waivers. Such uncertainty extends even to the Congress of the United States, which is evident from the enactment of Section 506 of the Revenue Act of 1928. In fact, that Section undoubtedly contemplates that an authoritative ruling shall be made by the courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. As conflict in the decisions of the courts immediately subordinate to this Court regarding the validity of waivers, given after the expiration of the statutory period, now exists, only by a decision of this Court of such question may an authoritative ruling be secured.

The questions involved in paragraphs (*a*) and (*b*) above, relating to the validity of waivers given after the expiration of the statutory period of limitation, are similar to the question involved in the case of Charles H. Stange *v.* The United States, No. 554, of the present term of this Court, wherein a writ of certiorari to the Court of Claims was issued by this Court on March 3, 1920. The order in the Stange case contained this restrictive provision:

> "Counsel shall confine themselves in the briefs and in oral argument to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause."

We ask for nothing more on this application than a review of the validity and effect of the waivers involved in the present case.

Subsequent to the issuance of the writ in the Stange case, this Court issued a writ of certiorari in the case of Annette Aiken, adminx., *v.* Commissioner of Internal Revenue, No. 777 of the present term of this Court, wherein there was involved, also, the question of the validity of a waiver given after the expiration of the statutory period.

The other points presented above relate chiefly to the *effect* of the waiver of October 25, 1924. This waiver expired by its terms on December 10, 1925. Our view is that no provision of the Revenue Act of 1924 extended the period *for making collection of the tax*, in cases such as we have here. In saying this we have not overlooked Section 277 (*b*) of that Act. This section extends the period for making assessments, but not the period for enforcing collection.

Nor have we overlooked the limitation of six years after assessment, for enforcing collection, specified in Section 278 (*d*) of the 1924 Act. In the present case, the assessment was made in March, 1923, and therefore before the passage of the Revenue Act of 1924. Subdivision (*e*) of Section 278 expressly provides that that Section shall not "affect any assessment made * * * before the enactment of this Act"; and this provision was vitalized by this Court in the case of Russell *v.* United States, 278 U. S. 181.

One of the remaining questions is whether the Revenue Act of 1926 shall be given a retroactive effect, so

as to remove the bar of the statute fallen before its passage. The rule undoubtedly is that a taxing statute will not be construed to disturb rights fixed before its passage, unless the language used is susceptible of no other reasonable construction. Our view is that under this rule of construction the limitation provisions of the Revenue Act of 1926 have no application to the present case, where the collection period as extended by the waiver expired prior to its passage.

That the present case involves questions of general interest, of an important nature, we believe, will not be questioned.

For these reasons we respectfully request the issuance of the writ of certiorari in the present case.

W. W. SPALDING,
Counsel for Petitioner,
1021 *Tower Building,*
Washington, D. C.

MASON, SPALDING & McATEE,
Of Counsel.